IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 74964-7
Respondent,	)	
	)	
v.	)	EN BANC
	)	
ARTURO R. RECUENCO,	)	
	)	
Petitioner.	)	
_____	)	Filed April 17, 2008

C. JOHNSON, J.—This case asks us to determine whether Washington law requires a harmless error analysis where a sentencing factor, such as imposition of a firearm enhancement based on a deadly weapon finding, was not submitted to the jury.[1] The United States Supreme Court in *Washington v. Recuenco*, 548 U.S. 212,

[1] The parties also briefed the issue of mootness pursuant to Arturo Recuenco's August 2006 request that the case be dismissed as moot. We decline Recuenco's request to moot the case. Both Recuenco and the State have legally cognizable interests in the outcome of this matter. Further, although we cannot provide Recuenco with relief in the form of less confinement because he has already completed his sentence, the same relief, reversal of his conviction and remand for entry of a conviction of second degree assault with a deadly weapon, is available to Recuenco today as was available when he originally petitioned this court for review in 2003.

126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), held that *Blakely*[2] errors can be subject to harmless error analysis. We conclude that under Washington law, harmless error analysis does not apply in these circumstances. On remand, we affirm *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), and remand to the trial court.

FACTUAL AND PROCEDURAL HISTORY

On September 18, 1999, Arturo R. Recuenco was involved in an altercation with his wife and threatened her with a handgun. Based on this incident, Recuenco was charged by information with second degree assault "with a deadly weapon, to-wit: a handgun" pursuant to former RCW 9.94A.125 (1983) and former RCW 9.94A.310 (1999).[3] Defense counsel proposed a special verdict form directing the jury to make a specific finding regarding whether Recuenco was "armed with a deadly weapon at the time of the commission of the crime," and the court accepted this form. Defense counsel also requested that a definition of a "firearm" be submitted to the jury to explain the deadly weapon definition, but the prosecutor

[2] *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).
[3] Former RCW 9.94A.125, *recodified as* RCW 9.94A.602 and former RCW 9.94A.310, *recodified as* RCW 9.94A.510.

stated that that was unnecessary because no element of a firearm was included in the charged crime or enhancement. The jury, in addition to finding Recuenco guilty of second degree assault, returned a special verdict finding that Recuenco was armed with a deadly weapon during the commission of the second degree assault. The information did not contain an allegation that a firearm enhancement applied, nor did the jury return a special verdict concluding that Recuenco was armed with a firearm.

At sentencing, the State requested the low end of the standard sentencing range, 3 months, plus a 36-month firearm enhancement. Defense counsel argued that only a 12-month deadly weapon enhancement was appropriate because the jury had returned a special verdict with only a deadly weapon finding.[4] The trial court imposed a 36-month firearm enhancement instead of the 12-month deadly weapon enhancement charged in the information and found by the jury.

Recuenco appealed his conviction and sentence, arguing that he was deprived of his due process rights because a firearm enhancement was imposed despite the

[4] For assault in the second degree, a class B felony, the firearm enhancement is three mandatory years, while a deadly weapon enhancement is one mandatory year. Former RCW 9.94A.310(3)(b), (4)(b).

jury finding that he was armed with the deadly weapon. The Court of Appeals held that any possible error was harmless because the only weapon mentioned at any stage of the proceedings was a firearm. *State v. Recuenco*, noted at 117 Wn. App. 1079, 2003 WL 21738927, at *5.

The focus of our first review of Recuenco's case was on the application of *Apprendi* and *Blakely*. *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The United States Supreme Court in *Apprendi,* held that other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490. In *Blakely*, the Court clarified "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely,* 542 U.S. at 303. Thus, based on *Blakely*, we reversed and vacated Recuenco's sentence on the grounds that imposing the firearm enhancement without a firearm finding by the jury violated Recuenco's *Blakely* Sixth Amendment rights. *Recuenco*, 154 Wn.2d 156

(hereinafter *Recuenco* I).

In our initial review, we did not consider whether the error of failing to submit the firearm finding to the jury was harmless because we understood the federal constitution to prohibit harmless error analysis of Sixth Amendment violations under *Blakely*. *See State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005), *overruled in part by Recuenco,* _ U.S. _, 126 S. Ct. 2546 (hereinafter *Recuenco* II). In *Recuenco* II, the United States Supreme Court reversed our decision, stating that under federal law the failure to submit a sentencing factor to the jury is subject to harmless error analysis. *Recuenco* II, 126 S. Ct. at 2553.

The Supreme Court remanded the case to us to consider whether the failure to submit a sentencing factor to the jury is subject to harmless error analysis under Washington law.

ANALYSIS

Before embarking on our analysis, it is necessary to focus on what error occurred in this case and how the claim of error evolved. To determine where the claim of error began, the initial inquiry focuses on the information specifying the charges. The State has the authority and responsibility for bringing charges against

a person. In that regard, the State possesses wide discretion to choose the charges it wants to pursue, if any.

Our cases have required the State to include in the charging documents the essential elements of the crime alleged. *City of Auburn v. Brooke*, 119 Wn.2d 623, 627, 836 P.2d 212 (1992). The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). "Elements" are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. *State v. Johnstone*, 96 Wn. App. 839, 844, 982 P.2d 119 (1999). The purpose of the essential elements rule is to provide defendants with notice of the crime charged and to allow defendants to prepare a defense. *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995).

Sentencing enhancements, such as a deadly weapon allegation, must be included in the information. *In re Pers. Restraint of Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981). When the term '"sentence enhancement"' describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an '"element"' of a greater offense than the one covered by the jury's guilty verdict.

Apprendi, 530 U.S. at 494 n.19. Contrary to the dissent's assertions, Washington law requires the State to allege in the information the crime

which it seeks to establish.[5] This includes sentencing enhancements. *See State v. Crawford*, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) (stating that prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information).

We examined a similar issue in an earlier case, *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980), in which the defendant was charged by information with two counts of first degree murder. At that time, the State filed a separate notice advising the defendant that it would seek a firearm and a deadly weapon enhancement. The State subsequently amended the information by realleging the two counts of first degree murder and adding a count of second degree murder. However, the State did not file another notice of intent to seek enhanced penalties in conjunction with the amended information, and no intention to seek an enhanced

[5] Presumably, the dissent would uphold a firearm enhancement even where the State failed to allege any and where the jury was not asked to make any finding. Such a result is contrary to our cases which define the State's constitutional duty. See *State v. Campbell*, 125 Wn.2d 797, 888 P.2d 1185 (1995) (due process doctrines and federal and state constitutions require a charging document to give notice of the nature and cause of an accusation), and those cases discussing the state constitutional guaranty of the right to a jury trial. *See, e.g.*, *State v. Kirkman*, 159 Wn.2d 918, 938, 155 P.3d 125 (2007) (affirming our "right of jury trial[] 'is no mere procedural formality, but a fundamental reservation of power in our constitutional structure'" (quoting *State v. Evans*, 154 Wn.2d 438, 445, 114 P.3d 627 (2005))).

penalty under any of the counts was indicated in either information. The defendant was found guilty of second degree felony murder, and by special interrogatory, the jury found petitioner was armed with a deadly weapon, a firearm, at the time of the commission of the crime. However, the State neglected to provide the defendant with notice that it intended to seek an enhanced penalty in its information. We remanded for resentencing because "[w]hen prosecutors seek enhanced penalties, notice of their intent must be set forth in the information." *Theroff*, 95 Wn.2d at 392. Thus, unless a complaint is properly amended, once the State elects which specific charges it is pursuing and includes elements in the charging document, it is bound by that decision. We have not altered this requirement.

Recuenco's case is similar because it also involves a charging decision made by the State. The prosecutor chose to charge the lesser enhancement of "deadly weapon." Former RCW 9.94A.310(4)(b).[6] This provided Recuenco with notice of the charged offense and the ability to prepare a defense, as required by our state and federal constitutions.[7] Moreover, consistent with the specific charge brought, the

[6] *Recodified* as RCW 9.94A.533(4)(b).

[7] "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." U.S. Const. amend. VI. "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation

jury was instructed on the deadly weapon enhancement and specifically found Recuenco guilty of second degree assault while armed with a deadly weapon. There is nothing erroneous about that finding.

Curiously, the dissent erroneously analyzes the issues in this case by discussing the lack of objection to the information and the liberal standard applicable to postverdict challenges. Dissent at 10-13. As noted above, there is no error in the information at all; the State alleged that the defendant was armed with a deadly weapon where it could have alleged a firearm enhancement or not sought any enhancement at all. That was the choice of the State at the time it filed the information. No error occurred in the jury's findings. In fact, it was not until Recuenco was sentenced for an enhancement that was not charged nor found by the jury that any error had occurred at all. Up to that point, no basis existed for Recuenco to challenge the information, and no argument is presented to us that any defect existed in the information until the sentencing judge imposed a sentence for a crime the State never charged or asked for.

A difference of two years in prison exists between an enhancement for a

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against him . . . ." Wash. Const. art. I, § 22.

"deadly weapon" and an enhancement for a "firearm." Specifically, a charge of second degree assault while armed with a deadly weapon under former RCW 9.94A.310(4)(b), as charged in this case, adds one mandatory year to the defendant's sentence, but a charge of second degree assault while armed with a firearm under RCW 9.94A.310(3)(b) adds three years to the defendant's sentence. The State opted to charge the lesser enhancement of "deadly weapon."

To remove any doubt about what the State was seeking in this case, a review of the record answers any question about whether the error occurred. After the jury returned its verdict and in response to Recuenco's motion to vacate, the prosecutor informed the court: '"[T]he method under which the state is alleging and the jury found the assault[] committed was by use of a deadly weapon."' *Recuenco* I, 154 Wn.2d at 160 (quoting report of proceedings). The prosecutor went on to clarify, '"in the crime charged and the enhancement the state alleged, there is no elements [sic] of a firearm. The element is assault with a deadly weapon."' *Recuenco* I, 154 Wn.2d at 160 (quoting report of proceedings). The record is clear.

The dissent appears to argue that because the only deadly weapon discussed at trial was a handgun, it was appropriate to ask for the firearm enhancement at

sentencing rather than the charged and convicted deadly weapon enhancement. The dissent overlooks here that in order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a "firearm:" "a weapon or device from which a projectile may be fired by an explosive such as gunpowder." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Supp. 2005) (WPIC). We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement. *State v. Pam*, 98 Wn.2d 748, 745-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown,* 111 Wn.2d 124, 761 P.2d 588 (1988).

Recuenco argues that "there is no procedure by which a jury could have returned a constitutionally sufficient verdict supporting a firearm enhancement in [his] case." Suppl. Br. of Pet'r on Remand at 16. However, Recuenco is not correct; a procedure does in fact exist. Under former RCW 9.94A.125 and former RCW 9.94A.310, the jury could have been instructed to make a firearm finding, as an examination of these statutes makes clear.

As originally enacted, the Sentencing Reform Act of 1981 (SRA), chapter

9.94A RCW, did not establish a discrete firearm enhancement. Instead, "firearm" was included in the definition of a "deadly weapon." Former RCW 9.94A.125; former RCW 9.94A.310. The deadly weapon enhancement provision mandated that specific additional times '"be added to the presumptive sentence if the offender or an accomplice was armed with a deadly weapon."' *State v. Silva-Baltazar*, 125 Wn.2d 472, 481, 886 P.2d 138 (1994) (emphasis omitted) (quoting former RCW 9.94A.310(3) (1994)). Operating in conjunction with the SRA's deadly weapon enhancement provision, former RCW 9.94A.125 provided:

> In a criminal case where there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the *court shall make a finding* of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, *or if a jury trial is had, the jury shall*, if it find[s] the defendant guilty, also *find a special verdict* as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
>
> For purposes of this section . . . [t]he following instruments are included in the term deadly weapon: . . . pistol, revolver, or any other firearm.

(Emphasis added.)

The hard time for armed crime act of 1995 (Hard Time Act) removed "firearm" from the definition of "deadly weapon." Laws of 1995, ch. 129, § 2. The

Hard Time Act '"split the previous deadly weapon enhancement into separate enhancements for firearms and for other deadly weapons."' *State v. Brown*, 139 Wn.2d 20, 25, 983 P.2d 608 (1999) (quoting State of Washington Sentencing Guidelines Comm'n, Adult Sentencing Guidelines Manual cmt. at II-67 (1997)); *see also* former RCW 9.94A.310(3)(b), (4)(b). Former RCW 9.94A.125, the statute authorizing a special verdict finding on a deadly weapon, was not amended to reflect the changes made by the Hard Time Act.

We disagree with Recuenco's argument that the legislature has "fail[ed] to create a statutory procedure by which a jury could find a firearm special verdict preclud[ing] the imposition of the firearm enhancements prescribed in [former] RCW 9.94A.310(3)." Suppl. Br. of Pet'r on Remand at 10. Former RCW 9.94A.125 expressly directs that the jury be asked by special verdict whether a defendant was armed with a deadly weapon and includes firearms within the definition of "deadly weapon." *Washington Practice* recognizes former RCW 9.94A.125 to authorize putting the firearm enhancement question to the jury in the form of a special verdict. 11 WPIC 2.10.01. The WPIC expressly provides a firearm sentence enhancement instruction for use "when there is a special allegation

that the defendant was armed with a firearm at the time of the commission of the crime pursuant to RCW 9.94A.533(3)." 11 WPIC 2.10.01, note on use.

This court has accepted the use of firearm special verdicts without remark. *See, e.g., State v. Eckenrode*, 159 Wn.2d 488, 150 P.3d 1116 (2007) (considering whether evidence presented was sufficient to uphold the jury's special verdict finding that the defendant was armed with a firearm); *State v. Barnes*, 153 Wn.2d 378, 381-83, 103 P.3d 1219 (2005) (noting without comment the jury's firearm special verdict finding). We hold that a procedure did and does exist whereby the jury can be asked to make a firearm finding.

In this case, no firearm instruction was given to the jury pursuant to WPIC 2.10.01. The jury was not given facts supporting the firearm enhancement nor given instructions to determine if it was applicable in this case. The only instruction given to the jury regarding sentencing enhancements was the special verdict for a deadly weapon. WPIC 2.06. It was only after the jury's verdict, at Recuenco's sentencing, that the prosecutor requested the three-year mandatory enhancement for use of a firearm. The sentencing judge then committed error by imposing a sentence outside the judge's authority, a sentence that was not authorized by the jury.

Our state constitution provides that "[t]he right of trial by jury shall remain inviolate." Const. art. I, § 21. Our prior cases have found this language indicates that our state constitution does, in some circumstances, provide greater protection for jury trials than the federal constitution. *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (stating that textual differences between the federal and state constitutions indicate the general importance of the right to jury trial in the Washington Constitution); *see also City of Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (noting that "our state constitution [is] more extensive than that which was protected by the federal constitution when it was adopted in 1789"). In this case, Recuenco had a right to have a jury determine beyond a reasonable doubt if he was guilty of the crime and sentencing enhancement charged. Without a jury determination that he was armed with a "firearm," the trial court lacked authority to sentence Recuenco for the additional two years that correspond with the greater enhancement. Further, Recuenco lacked any notice that he could be sentenced under the firearm enhancement.

An accused has a constitutionally protected right to be informed of the criminal charge against him, so he will be able to prepare and mount a defense at

trial. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). In *McCarty*, we held that even under the liberal construction applicable to postverdict challenges, an information is constitutionally deficient where it omits a necessary element of the crime. Although McCarty's charging document stated the crime was conspiracy to deliver drugs, it failed to allege the involvement of more than two people and thus did not give the defendant actual notice of the crime charged. The Court of Appeals had determined that there was notice to McCarty because he was made aware of the State's theory from the start of the case during opening arguments and during closing arguments, and because it was included in the instructions to the jury. However, to ensure due process, the notice of the charge on which a defendant will be tried must be logically given at some point prior to the opening statements of the trial. *McCarty*, 140 Wn.2d at 427 (citing *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995)).

Not only was Recuenco not informed of the charge of assault with a firearm before opening statements, he was not given notice until sentencing. Recuenco therefore lacked any ability to prepare an adequate defense nor had any reason or opportunity to challenge the information before that time. There was no error in the

charging decision, the information, or the jury determination. No harmless error analysis can apply to a case where the State specifically (and properly) adds an enhancement allegation and asks the jury to make the specific finding supporting the enhancement sought, and where the jury returns the verdict. In this case, the error occurred during the sentencing proceedings when the sentencing judge exceeded the authority issued to the court by the jury's determination.

In *Recuenco* II, the United States Supreme Court based its analysis on the understanding that the "error" was an error of judicial fact finding because that is how we previously treated it in *Recuenco* I. *Recuenco* II, 126 S. Ct. at 2552 n. 3. From that understanding, the Court stated Recuenco's case was indistinguishable from *Neder*, a case in which the Court held that omission of an element from jury instructions is subject to harmless error analysis. *Recuenco* II, 126 S. Ct. at 2552; *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). However, this case is distinguishable from *Neder*. In *Neder*, the defendant received notice because he was properly charged. In contrast, Recuenco was charged with second degree assault with a deadly weapon, a special verdict form was submitted regarding a deadly weapon finding, and the jury found guilt as to the properly

submitted sentencing enhancement of "deadly weapon." We recognize here that the harmless error doctrine simply does not apply because no error occurred in the jury's determination of guilt. The charge brought by the State, the jury instructions, and the jury's explicit findings left no fundamental "gap" for the trial court to fill.

The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges.

CONCLUSION

Recuenco was charged with assault with a deadly weapon enhancement, and he was convicted of assault with a deadly weapon enhancement, but he was erroneously sentenced with a firearm enhancement. We conclude it can never be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. In this situation, harmless error analysis does not apply. Therefore, we vacate the firearm sentence and remand for correction of the sentence.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:
Chief Justice Gerry L. Alexander
Justice Susan Owens

Justice Barbara A. Madsen

Justice Richard B. Sanders